

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

Case No. 2:93-cr-0259-LDG

12 | v.

ORDER

13 | GENE MICHAEL DIULIO,

14 || Defendant.

16 The defendant, Gene Michael Diulio, moves pursuant to 28 U.S.C. §2255 to vacate,
17 set aside, or correct his sentence (ECF Nos. 131, 134). The Court sentenced the
18 defendant as a career offender under the then-mandatory United Sentencing Guidelines
19 §4B1.1. He argues this sentence must be vacated because, pursuant to the Supreme
20 Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), he can no longer be
21 classified as a career offender. The United States opposes the motion (ECF No. 138).

22 The Court will deny the motion as premature, pursuant to *United States v. Blackstone*, 903
23 F.3d 1020, 1022 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762, 204 L. Ed. 2d 1146 (2019).

24 As relevant to the instant matter, a motion brought pursuant to §2255 may be timely
25 filed within one year of “the date on which the right asserted was initially recognized by the
26 Supreme Court, if that right has been newly recognized by the Supreme Court and made

1 retroactively applicable to cases on collateral review." *Id.* § 2255(f)(3). Diulio filed the
2 present motion within one year of the Supreme Court's decision in *Johnson*.

3 Diulio's motion would be timely if *Johnson* recognized a new right applicable to the
4 mandatory sentencing guidelines. In *Blackstone*, however, the Ninth Circuit held that
5 "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines
6 on collateral review." *Blackstone*, 903 F.3d at 1028. As in the present matter, *Blackstone*
7 concerned a §2255 motion brought by a defendant sentenced under the mandatory
8 Sentencing Guidelines as a career offender pursuant to §4B1.2. *Blackstone* cannot be
9 distinguished from this matter.

10 "If the Court extends *Johnson* to a sentence imposed at a time when the Sentencing
11 Guidelines were mandatory, then [the defendant] may be able to bring a timely motion
12 under § 2255. As of now, however, [the defendant's] motion is untimely." *Id.* Accordingly,
13 the Court must dismiss Diulio's motion as premature.¹

14 Certificate of Appealability

15 To appeal this order, Diulio must receive a certificate of appealability. 28 U.S.C. §
16 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(a). To obtain that certificate, he
17 "must make a substantial showing of the denial of a constitutional right, a demonstration
18 that . . . includes showing that reasonable jurists could debate whether (or, for that matter,
19 agree that) the petition should have been resolved in a different manner or that the issues

21 ¹ If Diulio's motion was timely, the Court would deny the motion on its merits.
22 Diulio's underlying argument is that his convictions for federal armed bank robbery under
23 18 U.S.C. §2113(a) and (d) do not qualify as crimes of violence pursuant to the "force
24 clause" found in §4B1.2(a)(1) because bank robbery can be committed by "intimidation."
25 The Ninth Circuit considered this same argument in *United States v. Watson*, 881 F.3d
26 782, 784 (9th Cir.), cert. denied, 139 S. Ct. 203, 202 L. Ed. 2d 139 (2018). The circuit court
rejected the argument, holding that bank robbery is a crime of violence pursuant to the
force clause defined at 18 U.S.C. §924(c). Given that the force clause in §4B1.2 is nearly
identical in its language and structure to the force clause defined at 18 U.S.C. §924(c), the
Court would find that Diulio's federal convictions for armed bank robbery qualify as crimes
of violence under the §4B1.2(a)(1) force clause.

1 presented were adequate to deserve encouragement to proceed further.” *Slack v.*
2 *McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted). This standard is “lenient.”
3 *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc). In the present matter,
4 the Ninth Circuit’s decision in *Blackstone* precludes this Court from finding that reasonable
5 jurists could debate whether (or, for that matter, agree that) Diulio’s motion was timely filed.
6 Accordingly, the Court will not grant a certificate of appealability.

7 Therefore, for good cause shown,

8 **THE COURT ORDERS** that Defendant Gene Michael Diulio’s Motion to Stay (ECF
9 No. 149) is DENIED as moot.

10 **THE COURT FURTHER ORDERS** that Defendant Gene Michael Diulio’s Motion for
11 Leave to File Supplemental Authority (ECF No. 141) is GRANTED.

12 **THE COURT FURTHER ORDERS** that Defendant Gene Michael Diulio’s Motion
13 Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence (ECF Nos. 131,
14 134) is DENIED.

15 **THE COURT FURTHER ORDERS** that it DENIES Defendant Gene Michael Diulio a
16 certificate of appealability.

17 **THE COURT FURTHER ORDERS** that the Clerk of Court is directed to enter a
18 separate civil judgment denying Defendant Gene Michael Diulio’s § 2255 motion. The
19 Clerk also shall file this order and the civil judgment in this case and in the related civil case
20 number 2:16-cv-1532-LDG.

21
22 DATED this 31 day of January, 2020.


23
24 Lloyd D. George
25 United States District Judge
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